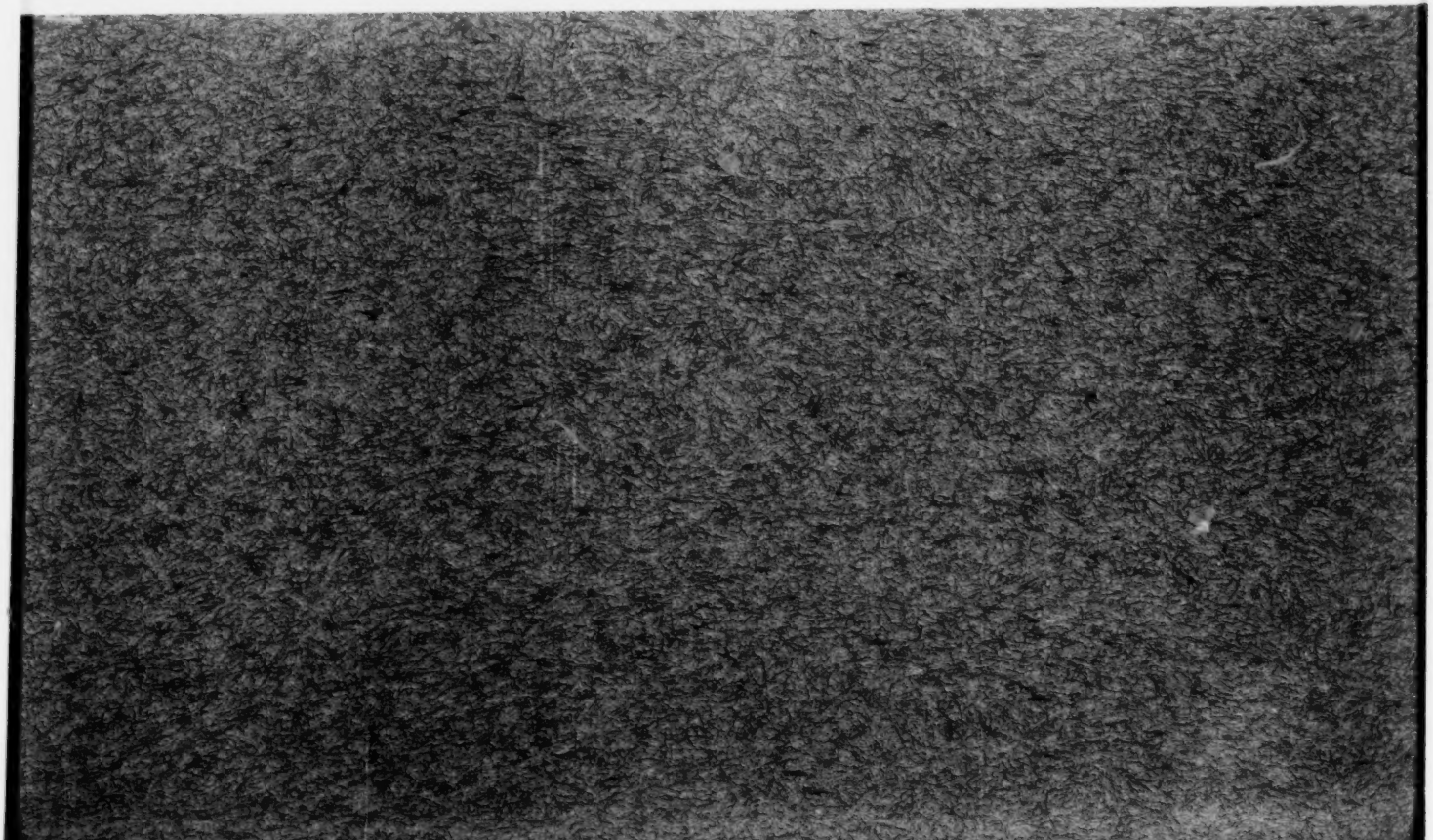

INDEX

CITATIONS

628929—45——1

Cases—Continued. Page

Miscellaneous:

Constitution and Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 819

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 134–138) was issued on November 13, 1944, and has not yet been reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 116–127) are reported in 50 N. L. R. B. 393. The decisions of the Board in a prior representation case which forms a part of the record in this case (R. 65–80, 94–96) are reported in 44 N. L. R. B. 533 and 46 N. L. R. B. 437.

JURISDICTION

The decree of the court below (R. 139–141) was entered November 24, 1944. The petition for a writ of certiorari was filed January 6, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the unfair labor practices of a nonprofit hospital in the District of Columbia affect commerce within the meaning of the Act.

2. Whether the Board may properly order petitioner to bargain with a labor organization which was certified by the Board as collective bargaining agent for petitioner's employees on the basis of an election in which less than a majority of the employees in the bargaining unit cast ballots.

3. Whether the court below properly denied petitioner's motion to adduce additional evidence to show that subsequent to the election a number of the employees who had been eligible to vote therein left petitioner's employ.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix (*infra,* pp. 18–22).

STATEMENT

A. PETITIONER'S BUSINESS

Petitioner, an association of private individuals incorporated in the District of Columbia, maintains and operates one of the largest hospitals in the city of Washington (R. 120; 10).[1] Although the hospital was incorporated under articles which recite the object of the association to be the gratuitous provision of medical and surgical service to needy persons, the hospital at present does only a negligible amount of pure charity work where no fees are charged, and collects what it can from indigent cases. (R. 122; 49–50, 52–53.) The hospital building contains 280 beds in private and semi-private rooms and in wards; a portion of its floor space is leased to a firm of private physicians who there operate X-ray equipment (R. 120; 10, 15, 37). The hospital provides facilities to treat medical and surgical cases (excluding contagious and obstetrical cases) and it maintains and operates a dispensary, an emergency room, and two ambulances (R. 120; 10, 13–14, 19). It employs approximately 120 professional and 230 non-professional employees (R. 120; 23–24).

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[1] References preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

In 1940, petitioner's gross income for the treatment of patients amounted to approximately $595,000 (R. 120; 30, 90). Approximately 50 percent of this sum was derived from private patients, as to whom petitioner made a substantial profit (R. 121; 12, 53, 81, 90); approximately 30 percent was secured from patients who come to it pursuant to workmen's compensation and group health contracts, as to which petitioner makes little or no profit (R. 121; 18–19, 31–33, 53, 90), and the remaining 20 percent was derived from services rendered patients pursuant to agreements with the District Health Department, the Health Security Administration, and the Washington Community Chest, as to which petitioner sustains a loss of about 50 percent (R. 121; 28, 31, 90). Petitioner receives $6,600 annually for rental of floor space for X-ray purposes referred to above (R. 120; 15–16, 37) and derives further income from a parking lot, gifts and endowments, and investments (R. 120; 24–25, 85–86). In 1940, petitioner made an operating profit of $717.85 (R. 121; 26, 82). In 1941, it sustained an operating loss but more than compensated for this loss from its investments and from its operating fund surplus, so that its books showed a net profit for that year (R. 121–122; 26–27, 82, 83).

Petitioner purchases supplies at a cost of approximately $20,000 per month (R. 120; 22, 83–

84). Between 25 and 35 percent of these purchases are shipped directly to the hospital from points outside the District of Columbia and the balance is purchased from local dealers who, in turn, received the goods from outside sources (R. 120–121; 38–41).

Approximately 10 percent of the patients treated by petitioner come from Maryland and Virginia (R. 120; 10, 88).

B. THE BOARD'S CERTIFICATION OF THE UNION AND PETITIONER'S REFUSAL TO BARGAIN

On October 21, 1942, the Board, pursuant to its Decision and Direction of Election in a representation proceeding under Section 9 of the Act (R. 122; 65–80), initiated upon the petition of Building Service Employees International Union, AFL, herein called the Union, conducted a secret ballot election among petitioner's non-professional and non-technical employees, whom the Board found constitute an appropriate bargaining unit (R. 123; 78–79, 92–93). Of the 251 employees eligible to vote in the election, 108 cast ballots, of which 75 were for the Union and 26 against (R. 123, footnote 4; 93). The Board, after having satisfied itself by investigation that the election was fair and the balloting representative of the wishes of the unit (R. 95), on December 26, 1942, certified the Union as the exclusive bargaining representative of the employees in the unit (R. 123; 94–96).

628929—45——2

On December 31, 1942, the Union, by letter to petitioner, requested a collective bargaining conference (R. 123–124; 101–102). On January 15, 1943, petitioner refused the request on the ground that it was not subject to the Act (R. 124; 102–104). Thereafter, petitioner also claimed that the Union was not entitled to bargaining status because "less than a majority of the total eligible voters participated in the election and only 30 percent cast their ballots for the union" (R. 114, 115).

On June 11, 1943, pursuant to a charge filed by Union, and following the usual proceedings pursuant to Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order (R. 116–127), in which it found that petitioner had violated section 8 (1) and (5) of the Act. It ordered petitioner to cease and desist from its unfair labor practices, to bargain collectively with the Union, and to post appropriate notices (R. 116–117).

On June 9, 1944, the Board filed with the court below a petition for enforcement (R. 4–7). On October 16, 1944, immediately after the argument before the court below, petitioner filed with the court a motion to adduce additional evidence, supported by an affidavit setting forth that as of that date, of the 251 employees who had been employed and eligible to vote in the election of October 21, 1942, only 43 were still employed by petitioner (R. 128–129). On November 13, the court denied the

motion (R. 133) and handed down its decision enforcing the Board's order in full (R. 134–141).

ARGUMENT

1. Petitioner's contention that it is not engaged in "trade" or "commerce" and hence not subject to the jurisdiction of the Act presents no question warranting review by this Court.[2] Petitioner's operations, described above, pp. 3–5, amply attest the fact that it is engaged in the sale of medical and hospital service on an extensive scale, in connection with which it purchases large quantities of supplies and employs a large, permanent staff of both professional and non-professional employees. A portion of its income is derived from the leasing of real estate which it owns to commercial firms. Such activities constitute trade, traffic, and commerce within the common understanding of these terms. In *Jordan* v. *Tashiro*, 278 U. S. 123, this Court considered the question of whether the operation of a general hospital was included within the words "trade" and "commerce" as used in a treaty with Japan authorizing Japanese subjects in the United States to carry on "trade" upon the same terms as native citizens. It held that it was

[2] Congress, in the exercise of its plenary power over the District of Columbia (Art. I, Sec. 8, U. S. Constitution, see *infra*, p. 23), has made subject to the Act employers engaged in trade or commerce within the District of Columbia (Section 2 (6), quoted *infra*, p. 20).

so included; that "the operation of a hospital as a business undertaking * * * is a commercial purpose," and that such activity was included within the meaning of the "terms 'trade' and 'commerce,' when used in conjunction with each other and with the grant of authority to lease land for 'commercial purposes.'" 278 U. S. 123, 128, 129.

The Court of Appeals for the District of Columbia in *United States* v. *American Medical Association,* 110 F. (2d) 703 (App. D. C.), certiorari denied, 310 U. S. 644, in a long and careful opinion pointed out (at pp. 706–711) that the practice of medicine has been considered "trade" under the English and American common law since early times, and held that the restraint of the business of a hospital and of Group Health Association, Inc., a membership association which procured hospital and medical service for its members, constituted a restraint of trade within the meaning of the Sherman Act. In a subsequent decision, *American Medical Ass'n* v. *United States,* 130 F. (2d) 233, upon a second appeal of the case, the court held (at pp. 236–238) that the rendering of hospital and medical services by certain hospitals in Washington, including petitioner herein, together with Group Health Association, constituted "trade" within the meaning of the Sherman Act. Upon appeal to this Court, *American Medical Association* v. *United States,* 317 U. S. 519, the Court (at p. 528) considered that the form of the indict-

ment rendered unnecessary a decision of the character of the service rendered by physicians but affirmed the holding of the lower court that the procuring of medical services by Group Health Association constituted trade.

Petitioner's contention that the Act was not intended to apply to the hospital as a charitable, non-profit making institution is without merit. It is well settled that the non-profit character of an enterprise does not remove otherwise commercial activities from the field of commerce, and that the limits of the commerce power are not fixed by the existence of a narrowly "commercial" motive or profit incentive. *Caminetti* v. *United States*, 242 U. S. 470; *Gooch* v. *United States*, 297 U. S. 124; *Covington and Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204; *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465; *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678 (C. C. A. 8). In *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128–129, the Court stated that the determination whether an enterprise is engaged in commerce is "unaffected by the fact that the [enterprise] * * * does not operate for profit," and it specifically held that cooperative, non-profit organizations are not exempt from the Act. See also *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643; *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board*, 109 F. (2d)

76 (C. C. A. 9), certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Grower-Shipper Vegetable Ass'n*, 122 F. (2d) 368 (C. C. A. 9); cf. *American Medical Association* v. *United States*, 317 U. S. 519, 528. Indeed, Section 2 (2) of the Act expressly identifies labor organizations when acting as an employer as subject to the Act, although labor organizations may be organized on a non-profit basis.

Nor does the fact that petitioner is a hospital remove it from the scope of the statute. Congress expressly excepted some types of employers and employees from the coverage of the Act. Hospitals and their employees are not included within such exceptions, and there is no basis in the Act or its legislative history for reading such an exception in to it.[3] The court below therefore properly held that petitioner was engaged in trade and

[3] Petitioner (Pet. 14–16) points to state court decisions in Pennsylvania and New York holding that so-called charitable hospitals perform governmental functions, and hence are not subject to the labor relations acts of their respective States. *Western Pennsylvania Hospital, et al.* v. *Lichliter*, 340 Pa. 382, 387, 17 Atl. (2d) 206, 209; *Jewish Hospital of Brooklyn* v. *Doe et al.*, 300 N. Y. S. 1111); *State Labor Relations Board* v. *McChesney*, 27 N. Y. S. (2d) 866, 27 N. Y. S. (2d) 870. But see *Northwestern Hospital* v. *Public Building Service Employees' Union*, 208 Minn. 389, 294 N. W. 215; *Wisconsin Employment Relations Board* v. *Evangelical Deaconess Society of Wisconsin*, 242 Wis. 78, 7 N. W. (2d) 590, in which the Supreme Courts of Wisconsin and Minnesota, respectively, held that the state labor relations acts of these States applied to hospitals.

commerce within the meaning of the Act and was subject to the jurisdiction of the Board.

2. The court below properly sustained the Board's certification of the Union [4] upon the basis of a majority vote cast in an election in which less than a majority of the eligible employees participated. It is clear from the legislative history of the Act that Congress, in providing in Section 9 (a) of the Act (quoted *infra*, p. 21) that "representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees * * * for the purposes of collective bargaining * * *" intended the selection of such representatives to be made by the majority vote of those participating in the selection. Congress prior to the Act had adopted this principle in the Railway Labor Act.[5] It had likewise been applied in industries outside the railway industry by the President's Executive Order No. 6580, in which the President, on February 1, 1934,

[4] The validity of the Board's certification was, of course, an issue before the court in the proceeding for review or enforcement of the Board's order directing petitioner to bargain with the Union. Section 9 (d); *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 459.

[5] Section 2, Fourth, of the Railway Labor Act (45 U. S. C., Sec. 152 (4)) provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." The Report of the Senate Committee

implemented Section 7 (a) of the National Industrial Recovery Act, by providing for the conduct of elections by the National Labor Board and for the certification of representatives designated by the majority of those voting in such election.[6] The Report of the House Committee on Labor on the bill which became the Act stated that "* * * the bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by section 7 (a) of the National Industrial Recovery Act, with the addition of enforcement machinery of familiar pattern."[7]

The principle of selection of representatives by a majority of those voting was judicially confirmed by this Court in *Virginia Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, in construing Section 2, Fourth, of the Railway Labor Act. The Court's opinion stated (300 U. S. at 560):

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on Interstate Commerce which accompanied the bill stated that "the bill specifically provides that the choice of representatives of any craft shall be determined *by a majority of the employees voting on the question.*" (italics supplied). Report No. 1065, 73rd Cong., 2nd Sess., p. 2.

[6] Executive Order No. 6580, February 1, 1934, provided, *inter alia*, for the certification by the National Labor Board of "representatives who are selected by the vote of at least a majority of the employees voting and have been thereby designated to represent all the employees eligible to participate in such an election for the purpose of collective bargaining or other mutual aid or protection in relation to their employer."

[7] House Report No. 1147, 74th Cong., 1st Sess., p. 3.

> Petitioner construes this section [2, Fourth] as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election [citing cases]. Those who do not participate "are presumed to assent to the expressed will of the majority of those voting [citing cases]."
>
> We see no reason or supposing that Section 2, Fourth, was intended to adopt a different rule. * * *

The circumstance that in the *Virginian Railway* case a majority of those eligible to vote participated in the election is not material. The rule governing political elections, upon which the Court relied and which Congress had in mind in establishing majority rule under this Act, makes no distinction based upon the number of participants. In *Carroll County* v. *Smith,* 111 U. S. 556, cited by this Court in the *Virginian Railway* case, only about one-third of those eligible to vote participated, but it was held that the statutory provision requiring the assent of two-thirds of the qualified voters had been satisfied.

In *St. Joseph Township* v. *Rogers,* 16 Wall. 644, where only a minority of those eligible to vote participated, this Court held (p. 664) that "the legislature in adopting the phrase 'a majority of the legal voters of the township,' intended to require only a majority of the legal voters of the township voting at the election."

The Board and the courts have uniformly followed the principle of the *Virginian Railway* case in cases under the National Labor Relations Act. *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. (2d) 144, 148–149 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *National Mineral Co.,* 134 F. (2d) 424, 426–428 (C. C. A. 7), certiorari denied, 320 U. S. 753; *National Labor Relations Board* v. *Whittier Mills Co.,* 111 F. (2d) 474, 477–478 (C. C. A. 5); *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. (2d) 586, 588 (C. C. A. 2), certiorari denied, 313 U. S. 594; *Matter of Western Foundry Co.,* 42 N. L. R. B. 302; *Matter of Spring City Foundry,* 11 N. L. R. B. 1286; *Matter of R. C. A. Mfg. Co., Inc.,* 2 N. L. R. B. 159, 173–179. There are no contrary decisions.[8]

3. The denial by the court below of petitioner's motion to adduce evidence of a change of personnel subsequent to the election presents no

[8] As noted in the Board's certification of the Union in the instant case (R. 95), the Board has as a matter of administrative discretion limited the application of the principle of

question of importance for the review of this Court. Such evidence, even if adduced, would be immaterial to the decision of the issues in the case. There is no allegation that the changes in personnel resulted in a loss of the Union's majority. Moreover, this Court has held upon numerous occasions that even a loss of the union majority among employees subsequent to an election but pending the employer's compliance with an order of the Board to bargain cannot operate to change the employer's duty to comply with the order. *Frank Bros. Company* v. *National Labor Relations Board,* 321 U. S. 702; *National Labor Relations Board* v. *P. Lorillard Co.,* 314 U. S. 512; *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 82; *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 339–340.

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the *Virginian Railway* decision to cases where the number of employees participating in the balloting warrants the assumption that the results of the election represent the wishes of the entire unit. See *Matter of S. A. Kendall, Jr.*, 41 N. L. R. B. 395, 397; *Matter of Bernard Gold and Jacob Wasserman*, 55 N. L. R. B. 591–592, in each of which only one of the three employees in the respective units voted in the elections. In the instant case, the Board, as appears from its decision (R. 95), conducted an independent investigation following the balloting, to ascertain whether the election was fair and representative. It found that it was (*ibid.*). Moreover, the record in the instant case indicates (R. 62), as the Board found (R. 95), that petitioner has a high rate of turnover among its employees, so that a substantial number of those whose names appeared on the eligibility pay-roll list were no longer employed by petitioner at the time of the election.

The court below pointed out that the employer in the instant case claimed that the change in personnel was created while the Board delayed filing a petition for enforcement but that the employer had made no move during this delay to raise the issue either by a petition to the Board to adduce additional evidence of a change in personnel or by a petition to the court to review and set aside the Board's order. The court properly held that the case fell directly within the principle enunciated in the *Frank Brothers* case, in which this Court (at pp. 704–705) noted with approval the Board's view that "a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain," and that the Board "might well think that, were it * * * [to] order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation," and held "That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement."

National Labor Relations Board v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, upon which petitioner seeks to rely (Pet. 20–21), is not in point. In that case, it was conceded that the union majority depended upon a definite group of employees who had engaged in a sit-down strike. When the Court ruled that the employer's discharge of these strikers was valid, the union majority was obviously dissipated. In the instant case there is no concession that the union majority depended upon the employees who left petitioner's employment. This Court in the *Frank Bros.* case sharply distinguished the *Fansteel* case from the situation there presented.

CONCLUSION

The decision of the court below is correct and there is neither a conflict of decisions nor any important question warranting review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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FEBRUARY 1945.